Supreme Court, U.S.
FILED
SEP 13 2002
CLERK

No. 02-198

IN THE

Supreme Court of the United States

KEVIN DEMBINSKI,
Petitioner,

v.

VOUGHT AIRCRAFT INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

W. RUSSELL HAMILTON, III *
CHRISTOPHER P. HAMMON
MORGAN, LEWIS & BOCKIUS LLP
5300 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2339
305.579.0300

* Counsel of Record

Counsel for Respondent Vought Aircraft Industries, Inc.

September 13, 2002

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

26 pp

QUESTION PRESENTED

Whether a plaintiff can prevail on a claim under the Americans with Disabilities Act for an allegedly improper disclosure of truthful information falling within the protections of 42 U.S.C. § 12112(d) without any evidence of harm proximately caused by such disclosure.

RULE 29.6 STATEMENT

In accordance with Rule 29.6 of the Rules of this Court, Respondent, Vought Aircraft Industries, Inc. ("Vought"), states that it does not have a parent company and that no publicly held company owns 10% or more of its stock.

In an abundance of caution, Vought also notes that Northrop Grumman Corporation was formerly a party to this action. (Vought acquired Northrop Grumman Corporation's commercial aerostructures business, in which petitioner was formerly employed, in July 2000. By agreement of the parties, the district court substituted Vought as defendant in this action.) Northrop Grumman Corporation does not have a parent company and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
A. Factual Background And The Litigation Below	2
B. Facts Pertinent To The Question Presented	4
ARGUMENT	7
I. DEMBINSKI HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT	7
A. The Relative Importance Of The Legal Question Presented Is Slight	7
B. The Lower Courts Did Not Deviate From Existing Jurisprudence And The Question Presented Has Had Only Limited, But Uniform Circuit Treatment.	8
II. TO REACH THE QUESTION PRESENTED WOULD REQUIRE EITHER: RESOLUTION OF A NUMBER OF PRELIMINARY QUESTIONS NOT DECIDED BY THE LOWER COURTS; OR THE MAKING OF UNSUPPORTED ASSUMPTIONS AS TO THE PROPER ANSWER TO THOSE QUESTIONS	10

TABLE OF CONTENTS—Continued

Page

III. DEMBINSKI DID NOT ARGUE THE QUESTION PRESENTED BEFORE THE LOWER COURTS AND, THUS, SHOULD NOT BE HEARD TO RAISE IT FOR THE FIRST TIME HERE 13

IV. IN THE ABSENCE OF ANY ARGUMENT FROM PETITIONER BELOW THAT EVIDENCE OF INJURY WAS UNNECESSARY, THE LOWER COURTS CORRECTLY FOLLOWED EXISTING PRECEDENT WHICH WAS THOROUGH, WELL-REASONED AND CONSISTENT WITH THE WELL-ESTABLISHED JURISPRUDENCE RELIED-UPON 14

CONCLUSION 17

APPENDIX 1a

TABLE OF AUTHORITIES

FEDERAL CASES Page

Albermarle Paper v. Moody, 422 U.S. 405 (1975) 15, 16, 17

Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999) 8

Armstrong v. Turner Indus., Inc., 141 F.3d 554 (5th Cir. 1998) ..... *passim*

Chevron USA, Inc. v. Echazabal, 122 S. Ct. 2045 (2002) 8

Cossette v. Minnesota Power & Light, 188 F.3d 964 (8th Cir. 1999) 8, 9

Davis v. Passman, 442 U.S. 228 (1979) 14, 15, 16

Doe v. Syracuse Sch. Dist., 508 F. Supp. 333 (N.D. N.Y. 1981) 8

Griffin v. Steeltek, Inc., 160 F.3d 591 (10th Cir. 1998) 9

Hoover v. Ronwin, 466 U.S. 558 (1984) 14

Murphy v. United Parcel Serv., Inc., 527 U.S. 516 (1999) 8

PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001) 8

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) 8

Tice v. Centre Area Trans. Auth., 247 F.3d 506 (3d Cir. 2001) 9

Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) 8

US Airways v. Barnett, 122 S. Ct. 1516 (2002) 8

Youakin v. Miller, 425 U.S. 231 (1976) 14

Youngberg v. Romeo, 457 U.S. 307 (1982) 14

TABLE OF AUTHORITIES—Continued

STATUTES	Page
29 U.S.C. § 701	8
42 U.S.C. § 12111(2)	12
42 U.S.C. § 12112(d)	*passim*
42 U.S.C. §§ 12101-12213	2
42 U.S.C. §§ 2000e-2000e-17	15
Texas Labor Code § 451.001	2, 4

IN THE

Supreme Court of the United States

No. 02-198

KEVIN DEMBINSKI,
Petitioner,

v.

VOUGHT AIRCRAFT INDUSTRIES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The vast majority of petitioner's Statement of the Case has no direct bearing on the Question Presented. And much of it, both portions irrelevant and pertinent to the Question Presented, recites "facts" that either were not part of the record before the lower courts, or are inaccurate or distort the factual findings of those courts. Rather than address each of those distortions, inaccuracies and unsupported "facts," described below is an overview of the case based on the record before, and factual findings of the lower courts (findings which are not challenged by petitioner), with emphasis on those portions of the record pertinent to the Question Presented.

A. Factual Background And The Litigation Below.

Petitioner's complaint, originally brought against Northrop Grumman Corporation ("NGC") [1], asserted claims of: disability discrimination under the Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA"); inappropriate disclosure of confidential medical information under the ADA, 42 U.S.C. § 12112(d)(3)(B) [2]; retaliation under the Texas Workers' Compensation Act, Texas Labor Code § 451.001 ("TWCA"); and invasion of privacy under Florida common law.

Petitioner, Kevin Dembinski ("Dembinski"), the global Director of Business Development for NGC at the time, was injured as a result of an unfortunate fall on an icy sidewalk while returning one evening from entertaining a customer in Paris. Pet. App. at 6a. The injury, or the original medical treatment of the injury, aggravated a preexisting muscoskeletal condition. Dembinski was ultimately diagnosed as having Post Polio Syndrome ("PPS"), and his treating physician eventually placed him on permanent restrictions prohibiting him from doing work of any kind. *Id.* at 6a-8a & 13a. Understandably, Dembinski himself certified that "[t]he severe pain . . . and fatigue make it impossible to work."

In the interim, though Dembinski was severely restricted in what he could do and no longer could perform all of the essential job functions required of him as NGC's global Director of Business Development, NGC initially allowed Dembinski to perform some work temporarily from home

---

[1] Respondent, Vought Aircraft Industries, Inc. ("Vought"), acquired NGC's international commercial aerostructures business, in which petitioner was formerly employed, in July 2000. By agreement of the parties, the district court substituted Vought as defendant in this action.

[2] *See* Appendix A for portions of 42 U.S.C. § 12112(d) pertinent to the Question Presented.

(something NGC was not required to do under the ADA, but did nonetheless). *Id.* at 6a. But, it eventually became clear that Dembinski's condition, preventing him from being able to return and perform the full range of essential job functions, was not improving and would be of an indeterminate duration. *Id.* As a result, NGC placed Dembinski on a leave of absence until he could so perform. *Id.*

In response to a request from Dembinski, and pursuant to NGC policy, a Reasonable Accommodation Committee ("RAC") was convened to determine whether Dembinski was capable, in his then-current condition, of performing the essential functions of his job; and, if not, whether there was any reasonable accommodation that would facilitate his return to performing the essential functions of his job. *Id.* at 7a. After considering the issues, the RAC concluded that it was not possible for Dembinski to perform all of the essential functions of his position as global Director of Business Development without any travel and without some routine, schedulable presence in the workplace where cognizant management and the rest of the Business Development team were co-located. *Id.* at 7a & 8a. And, per Dembinski and his physician, he could do neither. *Id.* at 8a. But he proffered relief from travel and workplace presence as reasonable accommodations. *Id.* at 7a. The RAC concluded that, based on this, Dembinski could not perform the essential functions of his job and further concluded there was no reasonable accommodation that would otherwise afford him the ability to perform those essential job functions. *Id.*

The district court found those conclusions (and a subsequent conclusion that Dembinski was not qualified for openings at another facility (*id.* at 18a-19a)) to be justified as a matter of law based on material facts as to which there was no genuine dispute (Pet. App. 15a-20a). It, thus, entered judgment for Vought on Dembinski's ADA disability claims

(*id.* at 29a). The court of appeals affirmed (*id.* at 1a-2a) and those findings are not being challenged by petitioner.

As to Dembinski's TWCA claim and his array of Florida common law invasion of privacy claims, the district court likewise found as a matter of law based on facts as to which there is no genuine dispute that each failed (*id.* at 22a-24a & 24a-27a) and, thus, also entered judgment for Vought on them. Though Dembinski did not seek review in the court of appeals of the invasion-of-privacy claims, he did as to the TWCA claim. As to that TWCA claim, the court of appeals affirmed the district court, and that is not being challenged here.

On Dembinski's ADA claim of inappropriate disclosure of confidential medical information, the district court found that because Dembinski had no evidence of any legally-compensable injury-in-fact, a prerequisite element for such a claim, Dembinski's claim under 42 U.S.C. § 12112(d) failed. *Id.* at 20a-22a. Based on this, the district court entered judgment for Vought on that claim as well. And, the court of appeals affirmed. The Question Presented in the Petition does not challenge the underlying factual findings; rather it relates only to the legal standard applied in addressing this inappropriate-disclosure claim.

B. Facts Pertinent To The Question Presented.

The communications underlying petitioner's inappropriate-disclosure claim were three.

When it was determined that Dembinski's previously-perceived temporary absence would be indefinite, steps had to be taken to reassign Dembinski's responsibilities, and to communicate this to affected customers. *Id.* at 11a. To accomplish this, a letter was sent to several customers. *Id.* The letter explained that Dembinski, their then-current NGC contact, was now "on medical leave" and they should look to another named individual as their NGC contact. *Id.* This is

the first communication Dembinski asserts was an inappropriate disclosure of confidential medical information violative of 42 U.S.C. § 12112(d).

Approximately seven months later, one of Dembinski's co-workers sent an e-mail to one potential customer seeking to set up business-generating opportunities. *Id.* In it (and in order to explain why he, and not one of them, was the one making the contact), the co-worker indicated, among other things, that NGC had recently "lost" another employee to a different company and Dembinski to PPS. *Id.* This is the second communication to which Dembinski points as being an inappropriate disclosure by his employer of confidential medical information.

The final communication comes from a report commissioned by Dembinski from a reference-checking service retained by Dembinski at his attorney's suggestion following the filing of his suit.[3] *Id.* at 13a. According to the report, Dembinski's manager, in addition to giving Dembinski the next-to-highest rating available and offering that he would "enthusiastically recommend" Dembinski for employment, truthfully indicated (in response to inquiries from the reference-checking service) that Dembinski was on leave due to a long-term disability and that Vought needed Dembinski to travel, but he could not. *Id.* The nature of Dembinski's condition was not revealed. *Id.*

By Dembinski's own admission, he had no actual evidence of any injury proximately caused by any of the above communications. *Id.* at 20a-22a. Indeed, when asked what injury he had suffered, Dembinski merely asserted the possibility of injury. *Id.* at 22a. In the end, he finally

---

[3] In both the district court and before the court of appeals, Dembinski relied very heavily on this particular communication in support of his claim. *See, e.g., id.* at 21a. But it is not clear from his Petition whether or not Dembinski continues to rely on it before this Court.

admitted that: "I don't know what the harm was, okay. I do not know. It could have been catastrophic, it could have been nothing." Rather, Dembinski attempted to support his claim below by asserting that he suffered some injury based solely on the fact of disclosure itself. *Id.* at 21a-22a. In response to which the district court specifically found that Dembinski has "not put forth any evidence that proves he has suffered any actual injury-in-fact arising from the disclosure of anything." *Id.* This was affirmed by the court of appeals and Dembinski does not challenge this finding.

Despite this, at pages 14 through 15 of his Petition, Dembinski recites as "established" below that: the disclosures damaged his reputation; the correspondence to customers resulted in numerous questions to Dembinski about his medical condition; he suffered severe pain and suffering due to the disclosures; and the disclosures benefited Vought because had he obtained employment with a competitor/customer that would have enhanced that firm's competitive position against Vought. Dembinski cites no record support for any of these and noticeably missing from the district court's findings of fact (which have been affirmed by the court of appeals and are not challenged by the Petition) are any such findings. This is hardly surprising, because there was no evidence before the district court of any of these. Indeed, the district court specifically found (and these findings are not challenged here) that: "Dembinski has not put forth any evidence of damage to his reputation" (Pet. App. at 20a-21a); "Dembinski has no evidence of any legally-compensable injury" (*id.* at 21a); and "there is no evidence to support [Dembinski's] belief that NGC intended to harm his reputation, or that his reputation with his contacts had been, in fact, harmed" (*id.*).

ARGUMENT

The lower courts' decisions were correct and further review is not warranted. There is no conflict among the circuits on the question presented—to the contrary, the two other circuits that have addressed the narrow issue presented have decided it consistent with the decisions of the court of appeals and the district court in this case. Moreover, the question presented was not argued below, and has, thus far, been rarely addressed in the lower courts and is not one of such importance as to justify the sort of premature review advocated by Dembinski. And finally, even if this Court were inclined to take up the Question Presented, this case presents a poor vehicle upon which to decide this question of statutory construction because to do so would require this Court to make preliminary findings not made by either of the lower courts or to indulge assumptions that are problematic based on the record.

I. DEMBINSKI HAS NOT ARTICULATED A COMPELLING REASON TO JUSTIFY DISCRETIONARY REVIEW BY THIS COURT.

A. The Relative Importance Of The Legal Question Presented Is Slight.

The Question Presented is not one of such wide-spread national significance as to justify review in the absence of circuit conflict. Vought's exhaustive research has revealed that, of the many thousands and thousands of officially and unofficially reported ADA cases since the statute's inception in 1990, less than 150 even *cite* the subsection of the ADA, 42 U.S.C. § 12112(d), at issue here. And the vast majority of those cases deal with the propriety of employee fitness-for-duty examinations—a topic wholly irrelevant to the Question Presented. Only a small minority of the remainder even contain claims based on inappropriate disclosure of confidential medical information. And, most significantly,

only two other courts of appeals have been reported to have decided the issue, and both have ruled against petitioner's position. *Cossette v. Minnesota Power & Light*, 188 F.3d 964, 970 (8th Cir. 1999); *Armstrong v. Turner Indus., Inc.*, 141 F.3d 554, 562 (5th Cir. 1998).[4] Moreover, the factual circumstances of this case—a plaintiff suing under an infrequently-used cause of action and seeking legal redress for a nonexistent injury—is not one likely to often recur. In sum, when compared to the myriad of issues of wide-spread application that are being litigated regarding the breadth and depth of the ADA, and indeed have been recently addressed by this Court (*see, e.g., Chevron USA, Inc. v. Echazabal*, 122 S. Ct. 2045 (2002); *US Airways v. Barnett*, 122 S. Ct. 1516 (2002); *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002); *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001); *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); *Murphy v. United Parcel Serv., Inc.*, 527 U.S. 516 (1999); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999)), the importance of the legal Question Presented by this case is slight.

B. The Lower Courts Did Not Deviate From Existing Jurisprudence And The Question Presented Has Had Only Limited, But Uniform, Circuit Treatment.

In reaching its decision that Dembinski's claim under 42 U.S.C. § 12112(d) failed because Dembinski had not presented any evidence of a legally compensable injury-in-fact, the district court applied the only existing and, *heretofore, non-controversial* jurisprudence addressing that

---

[4] It would also appear that there has been but a single reported case (*Doe v. Syracuse Sch. Dist.*, 508 F. Supp. 333 (N.D. N.Y. 1981)) construing the regulation under the Rehabilitation Act of 1973, 29 U.S.C. § 701, upon which 42 U.S.C. § 12112(d) is based. *See Armstrong*, 141 F.3d at 562 n.19.

issue to factual findings not in dispute before this Court. The court of appeals affirmed, *per curiam*, simply finding "no merit in appellant's several claims for the reasons stated" by the district court. Pet. App. 2a.

Dembinski acknowledges that there is no conflict among the circuits on the question presented. Pet. at 13. The two other courts of appeals that have decided the issue are in unison: a plaintiff bringing a claim for inappropriate disclosure of confidential medical information under the ADA, 42 U.S.C. § 12112(d), must prove that he has suffered some legally-compensable, tangible injury-in-fact. *Cossette*, 188 F.3d at 970; *Armstrong*, 141 F.3d at 562 ("[D]amages liability under [42 U.S.C. § 12112(d)] must be based on something more than a mere violation of that provision. There must be some cognizable injury in fact of which the violation is a legal and proximate cause . . . ."). And the only other circuits considering analogous issues under 42 U.S.C. § 12112(d) are in complete accord. *Griffin v. Steeltek, Inc.*, 160 F.3d 591, 595 & n.5 (10th Cir. 1998) (holding that plaintiff bringing claim under 42 U.S.C. § 12112(d) based on his being subjected to an ADA-prohibited employment inquiry must likewise prove that he suffered a tangible injury-in-fact to prevail); *Tice v. Centre Area Transp. Auth.*, 247 F.3d 506, 520 (3d Cir. 2001) (holding that no claim can lie for violation of 42 U.S.C. § 12112(d)'s record-keeping obligations without proof of some consequent injury).

This Court's limited resources should not be expended on an issue that has arisen in only this and two other federal appellate cases, and has been resolved the same way in all three as well as being consistent with the only two other federal appellate cases addressing analogous issues under the pertinent statutory provision. Rather, this issue should be allowed to continue to percolate in the lower courts until either a broad consensus is reached, thus obviating any need for review, or a substantial conflict develops among the

circuits making review appropriate. Until then, the issue presented does not warrant further review.

II. TO REACH THE QUESTION PRESENTED WOULD REQUIRE EITHER: RESOLUTION OF A NUMBER OF PRELIMINARY QUESTIONS NOT DECIDED BY THE LOWER COURTS; OR THE MAKING OF UNSUPPORTED ASSUMPTIONS AS TO THE PROPER ANSWER TO THOSE QUESTIONS.

Because the district court found the absence of any evidence of any legally cognizable injury-in-fact, neither it nor the court of appeals addressed other prerequisite elements of a 42 U.S.C. § 12112(d) claim for relief. But, for this Court to reach the Question Presented, it would require this Court to make preliminary findings, not specifically made by either of the lower courts, or to make assumptions that: the ADA, specifically 42 U.S.C. § 12112(d), provides a private right of action for someone who is not a qualified individual with a disability, but about whom confidential medical information is disclosed; the type of information disclosed in this case was the type of medical information Congress intended to protect from disclosure; the underlying information was derived from one of the limited covered forms of medical examinations or inquiries; and, particularly in the case of the co-worker's e-mail disclosure that Dembinski had PPS, the disclosure was made by someone intended by Congress to be able to expose an employer to liability under 42 U.S.C. § 12112(d) by such disclosure.

The ADA only protects from disclosure "information . . . regarding the medical condition or history" of the employee. The ADA does not, however, define, "information . . . regarding the medical condition or history," and there is a dearth of reported cases under either the ADA or the Rehabilitation Act providing any guidance. While disclosure of someone's diagnosis would seem to fall within a

reasonable construction of "medical condition," information that someone is "on medical leave," "cannot travel," or is "on leave due to long-term disability," are far more problematic. Thus, to reach the Question Presented would either require this Court to construe the meaning of "information . . . regarding the medical condition or history" and make a finding as to whether the disclosures presented here fall within that construction, or make an assumption that the disclosures presented here are "information . . . regarding the medical condition or history" of Dembinski.

Second, the ADA only protects from disclosure the medical condition or history information obtained as part of a so-called "employment entrance examination" (42 U.S.C. § 12112(d)(3)), or from voluntary examinations as part of a voluntary health program or, possibly, from inquiries into the ability of an employee to perform job-related functions (*compare* 42 U.S.C. § 12112(d)(4)(B) & (C) *with* 42 U.S.C. § 12112(d)(3)(B)). It does not protect from disclosure information that might have come from any other source—for example: through the employee's own voluntary disclosure to management, co-workers or friends; or those co-workers' or friends' re-disclosure; or from an employee benefit plan or workers' compensation carrier providing the employee healthcare, disability or workers' compensation benefits. No evidence was presented by Dembinski (and no finding made by the district court) as to the origin of the information disclosed by Dembinski's manager. Thus to reach the Question Presented based on the manager's disclosure would require this Court to assume (without any record support or underlying lower court findings) that Dembinski's manager acquired the disclosed information from one of the forms of examination or inquiry specified in 42 U.S.C. §§ 12112(d)(3) or 12112(d)(4)(B), and not some other source. Further, Dembinski did not present any evidence that the original source of the information from which Dembinski's co-worker learned that Dembinski had PPS was one of the covered

forms of examination or inquiry. As a result, to reach the Question Presented as to the co-worker's disclosure would require an additional assumption by this Court (once again, without any record support or underlying lower court finding) that the information that came to the co-worker was derived from the type of examinations or inquiries covered by 42 U.S.C. §§ 12112(d)(3) or 12112(d)(4)(B).

Finally, the prohibitions of 42 U.S.C. § 12112(d) apply only to "covered entit[ies]." "Covered entity" is defined by the ADA to include "employer[s], employment agenc[ies], labor organization[s], or joint labor-management committee[s]." 42 U.S.C. § 12111(2). While established ADA jurisprudence makes an employer responsible for the unlawful conduct of its managers and supervisors, this derivative liability generally does not extend to co-workers. The only record evidence as to the disclosing co-worker's status is that he held a position similar to Dembinski's. And the only finding by the district court as to that status is that he was assigned some of Dembinski's duties. Pet. App. 11a. Thus, to reach the Question Presented as to the co-worker's disclosure would also either require a finding by this Court, based on this limited factual record, that the co-worker's status was such as to make his employer liable under 42 U.S.C. § 12112(d) for his disclosure or require an assumption by this Court (based on this same limited factual record and no underlying lower court finding) to the same effect.

As the above establishes, to reach the Question Presented would compel this Court to either make a number of threshold determinations and factual findings or assumptions unsupported by the record below or the lower courts' findings. Thus, any ruling on the Question Presented would be a ruling in the abstract and potentially ultimately irrelevant to the disposition of the case between the parties.

III. DEMBINSKI DID NOT ARGUE THE QUESTION PRESENTED BEFORE THE LOWER COURTS AND, THUS, SHOULD NOT BE HEARD TO RAISE IT FOR THE FIRST TIME HERE.

As stated by the Petitioner, the Question Presented, once again, is whether an "employee [is] required to establish a 'tangible injury in fact' in order to defeat a motion for summary judgment . . . and sustain a claim" under 42 U.S.C. § 12112(d). Thus, Dembinski's own Question Presented challenges only the injury-in-fact standard followed by the district court (*compare, e.g., Armstrong*, 141 F.3d at 562 *with* Pet. App. at 20a) and affirmed on appeal, arguing that a claimant should prevail upon proof of a mere violation of 42 U.S.C. § 12112(d) and in the absence of any proof of any proximately-caused harm. Pet. at 12.

But Dembinski did not make that argument either to the district court or to the court of appeals. Rather, Dembinski only argued before the district court and in his briefs on appeal that he had, in fact, presented evidence from which a jury could infer that he had been harmed. Specifically, Dembinski argued that "the evidence in our case surrounding this issue creates an issue of material fact with respect to whether defendant's disclosure foreclosed Dembinski from other employment, thus causing him economic harm." *See* Petitioner's initial brief before the Eleventh Circuit at 35; *see also* petitioner's reply brief before the Eleventh Circuit at 9-10. He made precisely the same argument before the district court. *See* Petitioner's memorandum in opposition to summary judgment before the district court at 15-17.

Thus, Dembinski did not challenge the injury-in-fact standard in the courts below; rather, he had argued that the evidence he adduced had met that standard. In light of this, the lower courts properly conducted their analysis utilizing the standard presented by the consistent—and only—precedent on the issue; and then applied that standard to the

factual record before them, and found the standard had not been met. As a result, neither the district court nor the court of appeals was called upon by Dembinski to decide the argument made by the Question Presented. Having failed to raise that argument below, this Court should not now consider it. *E.g., Hoover v. Ronwin*, 466 U.S. 558, 574 n.25 (1984) (refusing to consider argument not raised below); *Youngberg v. Romeo*, 457 U.S. 307, 316 n.19 (1982) (same); *Youakin v. Miller*, 425 U.S. 231, 234 (1976) (same).

IV. IN THE ABSENCE OF ANY ARGUMENT FROM PETITIONER BELOW THAT EVIDENCE OF INJURY WAS UNNECESSARY, THE LOWER COURTS CORRECTLY FOLLOWED EXISTING PRECEDENT WHICH WAS THOROUGH, WELL-REASONED AND CONSISTENT WITH THE WELL-ESTABLISHED JURISPRUDENCE RELIED-UPON.

In deciding the claim underlying the Petition, the district court principally relied on the reasoning of the Fifth Circuit in *Armstrong* as support for the proposition that damages liability under 42 U.S.C. § 12112(d) must be based on more than a mere violation of that section, but on some cognizable injury in fact legally and proximately caused by the violation. Pet. App. at 20a. *Armstrong*, in turn, based its reasoning on long-standing precedent from this Court governing the viability of claims for which no relief exists and defining the remedial framework available under the federal employment discrimination laws. *Armstrong*, 141 F.3d at 559-62.

First, the Fifth Circuit in *Armstrong* noted the distinction, pointed out by this Court in *Davis v. Passman*, 442 U.S. 228 (1979), between whether a litigant having a "cause of action" in the abstract versus whether the litigant has stated a claim "upon which relief can be granted" is entitled to pursue his claim. *Armstrong*, 141 F.3d at 559 (citing *Davis*, 442 U.S. at 239). Under *Davis*, where the claimant is not entitled to a

remedy, the claim should be dismissed regardless of whether the claimant has an abstract cause of action. *Davis*, 442 U.S. at 239; *Armstrong*, 141 F.3d at 559. Consequently, the Fifth Circuit went on to determine whether the plaintiff in *Armstrong* would be entitled to any remedy, even assuming *arguendo* that the plaintiff had a right of action and had adequately established a violation of 42 U.S.C. § 12112(d). *Armstrong*, 141 F.3d at 559-60.

As the Fifth Circuit pointed out, "*Albermarle Paper v. Moody*[; 422 U.S. 405 (1975),] remains the seminal case defining the remedies appropriate under Title VII" of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 ("Title VII"), and "provide[s] a useful starting point for consideration of the remedial aspects of all federal employment discrimination laws." *Id.* at 560 (citing *Albermarle Paper*, 422 U.S. at 418-19). *Albermarle Paper* established the general rule that federal courts are empowered to craft remedies designed to "make whole" individuals injured by employment discrimination. *Albermarle Paper*, 422 U.S. at 418-19; *Armstrong*, 141 F.3d at 560. The Fifth Circuit then, applying the principles of *Albermarle Paper*, defined its task:

> Under the "make whole" theory, a court's first task is to determine the injuries caused by discrimination that require judicial relief. In other words, the court must ascertain in what way the plaintiff is not whole.

Armstrong, 141 F.3d at 560. The plaintiff in *Armstrong* did not appeal the trial court's ruling that he had not been subjected to any unlawful discrimination flowing from the challenged disclosure (*id.* at 560) and had failed to proffer on appeal any other injury for which he was seeking redress (*id.* at 559). As a result, the Fifth Circuit searched the record in vain for any proof that the plaintiff had suffered "a cognizable and compensable injury arising out of" the alleged violation of 42 U.S.C. § 12112(d). *Id.* at 562.

The Fifth Circuit also specifically rejected the notion that a mere violation of 42 U.S.C. § 12112(d) itself constituted a compensable injury in fact:

> We reject this reading of the provision. This Court has been unable to find any indication either in the text of the ADA or in its legislative history that a violation of the prohibition [of 42 U.S.C. § 12112(d)], in and of itself, was intended to give rise to damages liability. . . . We find this approach to be consonant with the structure of the ADA as well as the principles embodied in the statute.

Armstrong, 141 F.3d at 561. The Fifth Circuit further explained that its holding necessarily followed *Albermarle Paper*'s "make whole" doctrine, stating succinctly, "Armstrong is entitled to no remedy because he has not been injured and has no need of being made 'whole.'" *Id.* at 562 n.20.

In this case, the district court examined the record before it (as had the Fifth Circuit in *Armstrong*) and came to quite the same conclusion with regard to Dembinski (a conclusion affirmed by the court of appeals and not challenged by his Petition). Pet. App. at 21a-22a.

Petitioner cites to a number of cases in an attempt to challenge the propriety of that analysis. Pet. at 16. But those cases are inapposite for a number of reasons, most significant of which is that none of them stands for the proposition that a claimant is entitled to a recovery based on nothing more than a bare statutory violation and in the complete absence of any evidence that the claimant has suffered some remediable harm.

Thus, the district court relied on (and the court of appeals affirmed) the reasoning in *Armstrong*, which was itself based on the well-reasoned application of long-standing and well-established precedent of this Court in *Davis* and *Albermarle*

Paper. And none of the cases cited by petitioner in his attempt to challenge that conclusion calls into question the lower courts' analysis here or creates any tension with the long-standing jurisprudence of this Court relied upon in that analysis.

CONCLUSION

The petition for *writ of certiorari* should be denied.

Respectfully submitted,

W. RUSSELL HAMILTON, III *
CHRISTOPHER P. HAMMON
MORGAN, LEWIS & BOCKIUS LLP
5300 First Union Financial Center
200 South Biscayne Boulevard
Miami, Florida 33131-2339
305.579.0300

* Counsel of Record

Counsel for Respondent Vought Aircraft Industries, Inc.

September 13, 2002

APPENDIX

APPENDIX

Applicable Statutory Provision

42 U.S.C. § 12112(d) provides in pertinent part:

(d) Medical examinations and inquiries

...

(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at the work site. A covered entity may make inquiries into the ability of an employee to perform job-related factions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject the requirements of subparagraphs (B) and (C) of paragraph (3).

In turn, 42 U.S.C. §§ 12112(d)(3)(B) and (C) provide:

> (3) Employment entrance examination
>
> A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the result of such examination, if—
>
> ...
>
> (B) information obtained regarding the medical condition or history of the [employee] is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that—
>
> (i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;
>
> (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and
>
> (iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and
>
> (C) the results of such examinations are used only in accordance with this subchapter.